THE McNAMARA SENTENCE JUSTIFIED.

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There should be no compromise with crime and this means that crime should not be condoned. The efficiency of the jury system has been put to a severe test in California. What was done so successfully in the case of the so-called graft prosecutions in San Francisco, was attempted in the case of the prosecution of the McNamara brothers in Los Angeles: their crimes were excused and defended on the ground of expediency and necessity. If the people can become accustomed to this sort of thing they may ultimately look upon all crimes from this standpoint rather than from that of morality. Moral standards will then be undermined and corrupted. Civilization will have taken a backward step. No class of citizens, as distinguished from any other, can expect to sow the wind without our all being compelled to reap the whirlwind. The crimes committed in Los Angeles and the methods adopted by sympathizers to save the defendants were the logical and natural sequel to the almost complete breakdown of the administration of our criminal laws in San Francisco during the past five years. A wholesome respect for the criminal laws cannot be maintained in any community which enforces them or not only from motives of expediency, such as fear of injury to business through the publicity given by its efforts, or from what is equally bad, through a spirit of compromise with crime to secure dishonorable peace. That kind of peace is not worth having, and is only a delusion and a snare, which rests upon the surrender of its rights and duties by organized society, and which can be secured only by permitting the criminal to continue to retain and enjoy, unmolested and unrestricted, the fruits of his crime.

However, I unqualifiedly endorse the action of Captain Fredericks, the District Attorney of Los Angeles, in permitting the McNamara brothers to change their pleas of not guilty to pleas of guilty, and in recommending a small degree of clemency toward them by the Court in its sentences. This was in no sense a compromise with crime. How can a compromise be said to have taken place between organized labor and organized capital when whatever was done or attempted to be done represented merely the individual views and opinions of a few persons who were wholly unauthorized to act for either organized capital or organized labor? As a matter of fact there was no such issue to be com-

promised, because organized labor had always distinctly repudiated any responsibility for those crimes and the masses of its members and most of its leaders were astounded to learn that the McNamaras were guilty. Organized labor was defending the McNamaras upon the express theory that they were innocent of the crimes with which they were charged. As soon as the guilt of the McNamaras was established by their pleas of guilty, organized labor joined aggressively in the demand that they should be punished and many wanted to have the extreme penalty of the law inflicted upon them. Moreover, organized capital seems determined to push the prosecution against all other parties who may appear to have been implicated in the crimes.

It would be a complete misnomer, therefore, to call the result a compromise between organized capital and organized labor. It was the securing of the peace and security of society with honor. It was consistent with the District Attorney's oath and duty. He would have been blind to the highest interests of sociey if he had failed to take the action he did, and the Honorable Judge who presided over the trial court would have failed miserably to have measured up to the full responsibility of his position if he had not given due weight to the recommendation of the District Attorney. The clemency was not due to the defendants as a matter of right and justice, but to society as a whole because it will tend to promote the interest and welfare of society. The judge based his action upon correct reasons when he stated that he refrained "In the interest of justice" from imposing the maximum punishments provided by law, and that his action was in accordance with the principle commonly accepted in the administration of criminal jurisprudence when the defendant by pleading guilty saves the State the burden and expense of prosecuting him and abandons his defiant attitude toward organized society and its constituted authorities.

Moreover, District Attorney Fredericks was right when he said: "Counsel on the other side are well aware of the usual custom of granting some degree of consideration—not on the ground of mercy, but on that of *service to the state*—to a defendant who has pleaded guilty. This defendant has pleaded guilty. By so doing, he has settled that which for all time in the minds of a great many would have been a doubtful question. He has served the state in this way, and it is my judgment that some small degree of consideration should be extended to him because of that fact."

At common law the District Attorney was vested with a large amount of discretion in the performance of his duty. His right to suggest or recommend clemency in any given case is universally recognized by the

American courts. The court is, of course, not bound to follow the recommendation of the District Attorney, but it is the common practice for our courts to do so unless some good and exceptional reason exists for refraining from following the rule.

The primary and paramount object of the McNamara prosecutions undoubtedly was and ought to have been to put a stop to the commission of similar crimes in the future. The conviction and execution of both of the McNamaras would have failed to bring back the life of a single victim of that awful crime, or even to compensate the owner of the building which was destroyed for his financial loss. The average newspaper writer and the average man on the street seem to lose sight of the fundamental fact that all of our criminal laws are intended for the protection and welfare of society, and for that purpose alone. Each of them seems to think that the real object of every criminal law is to wreak vengeance upon the unfortunate individual who transgresses it. As a matter of fact retribution and vengeance as theories which justify the punishment of individuals for the violation of any law are relics of a barbarous age and have no proper place in modern civilization. It must be obvious to anyone that it is practically impossible to inflict the proper amount of punishment upon any individual unless the court can be put in possession of all the facts which are necessary to enable it to measure the degree of that particular individual's culpability. Of course it would be impossible to do this, because the environment of a man from the time he was born until the time he committed the crime would be a most important factor in determining this question. Nearly all students upon this question agree that the correct theory is that the law should never inflict punishment upon an individual except for the sake of some future good to be reached thereby, and because the safety or welfare of society demands it. In other words, the criminal law is said to proceed upon the utilitarian theory that the punishment is never justly imposed except when it has for its object the accomplishment of some future good.

All modern writers on the subject agree that the punishments provided by the law are intended to secure:

1. The deterrent effect, according to which punishments are inflicted in order that other would-be lawbreakers may be discouraged from crime.

2. The preventive effect, the aim of which, as its name implies, is to prevent a repetition of the offense by the imprisonment or execution of the criminal.

3. The reformatory effect, which is the moral reformation of the delinquent.

4. The educative effect, which is to arouse the conscience of the wrongdoer to the true nature of his act and to show him what is right and what is wrong, rather than to teach him that he should do what is right and avoid doing what is wrong.

5. The educative effect that the full exposure of the crime and of all the causes which lead to it, together with the punishment of the criminal, may have upon the community at large, and this in certain classes of crimes is by far the most important part of the educative influence which is exercised by such punishment.

By far the most important function of punishment for violations of the criminal law is that of securing a deterrent effect upon other would-be lawbreakers. From my personal experience and observation, coupled with a study of criminal statistics, I have become convinced that it is the swiftness and certainty of punishment, and not its severity, which will operate most effectively to deter other would-be lawbreakers from committing crime. When the punishment is more severe than the average juror considers just, convictions become less certain and less frequent. Consequently the deterrent effect is thus largely decreased, instead of being increased, by the very severity of the penalty which is attached to the crime.

In the McNamara cases the deterrent effect which has unquestionably been secured by the pleas of guilty and by the infliction of punishment at this comparatively short time after the arrest of the criminals, will be incalculably greater than any which could have been secured by convictions after prolonged trials which would unfortunately have failed to convince millions of our fellow citizens that they were guilty.

If, as we should, we eliminate from our consideration the element of vengeance, we are inevitably brought to the conclusion that the speedy and conclusive determination of those cases which was reached will be of inestimable value to society. It is difficult to conceive how a greater deterrent effect could possibly have been secured than the one which will now inevitably follow. Right minded members of organized labor will look with suspicion for some time to come upon any cases of dynamiting which occur in the future under circumstances which suggest a motive on the part of any radical members of organized labor. This fact alone will tend to deter reckless and irresponsible men from committing such crimes. If the McNamaras had been tried and convicted the evidence produced at the time of the trial would have been misrepresented to millions of our citizens by garbled and exaggerated reports, as well as by the suppression of important parts thereof, and millions of our fellow citizens would have always believed that the McNamara boys were the victims of

a capitalistic plot and were heroic martyrs to a great cause. In consequence thereof no appreciable deterrent effect whatever would have been secured by their conviction. Indeed, the contrary result might have followed. In other words, the deterrent effect which has been secured by the pleas of guilty which were made by the McNamaras is largely augmented by the educative effect which the outcome of the prosecutions has had upon the public at large, and particularly upon intelligent, law-abiding, patriotic members of organized labor. This is one of the most important effects of prosecutions. It is pre-eminently true of the McNamara cases as it was also of the recent prosecutions of municipal corruption in San Francisco. The educative effect upon the public at large in the latter cases led to certain amendments of the city charter, such as the referendum upon all public utility franchises, which will have a much greater deterrent effect upon future would-be lawbreakers than would have been secured by the mere imprisonment of all of the men who were under indictment. This is so because it will not pay for the officials of public utility corporations to bribe public officers to grant franchises to them which can immediately be defeated or vetoed by a majority vote of the people.

In conclusion, I repeat that the action of District Attorney Fredericks and Judge Bordwell was right, because the aim of the criminal law ought to be and is to promote and secure the general welfare of organized society and because the pleas of guilty by the McNamaras, with the swift and mercifully moderate punishment which followed, are better calculated to promote and secure that general welfare than long drawn out trials, with the attendant and inevitable evils which I have described, could possibly have done.